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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES G. HANNER,
Petitioner

v.

STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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CHARLES G. HANNER,
Petitioner

v.

STATE OF TEXAS,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Petitioner prays that a writ of certiorari issue to review the judgment of the Texas Court of Criminal Appeals entered in the above entitled case on November 1, 1978.

OPINIONS BELOW

The opinions of the Texas Court of Criminal Appeals are reported in *Hanner v. State*, 572 S.W.2d 702 (Tex. Crim. App. 1978). They are printed in the Appendix. (Pages 7-20).

JURISDICTION

The judgment of the Texas Court of Criminal Appeals was rendered on November 11, 1978. (App. p. 7). Motion for leave to file Motion for Rehearing was denied on November 20, 1978. (Appendix p. 26). The jurisdiction of this Court rests on 28 U.S.C. § 1257(3).

QUESTION PRESENTED

The jury's general verdict finding petitioner guilty of the offense of rape by force did not include by implication or otherwise a finding establishing the essential element of that offense that petitioner had sexual intercourse with the prosecutrix because the charge to which that verdict responded did not require the jury, as a condition of convicting, to find that that element was true.

The federal question presented is whether the unobjected to omission of that verdict to include a finding sufficient to establish that element operated to make the conviction repugnant to the Due Process Clause of the 14th Amendment to the United States Constitution.

CONSTITUTIONAL PROVISIONS INVOLVED

The constitutional provisions involved are the following provisions contained in the Due Process Clause of the 14th Amendment to the United States Constitution: ". . . nor shall any State deprive any person of . . . liberty . . . without due process of law."

STATEMENT

Petitioner seeks review of the affirmance by the Texas Court of Criminal Appeals of a judgment of conviction of petitioner for rape by force entered on a general

verdict that found him guilty as charged by the first count of the indictment.[1]

An element of the offense of rape by force of which petitioner was convicted, made essential by the statutory provisions on which the first count was based,[2] was that *he* had sexual intercourse with the prosecutrix.

That element, though prima facie proved, was not established by the jury's general verdict. This is true because the charge to which that verdict responded[3] did not require the jury, as a condition of convicting, to find that that element was true.

---

1. The first count alleged that on or about May 20, 1975 in Brazoria County, Texas, petitioner did "then and there intentionally and knowingly by force, that overcame such earnest resistance as might reasonably have been expected under the circumstances, compel Glenda R. Sanders, a female not his wife, to submit to sexual intercourse without her consent." (R. 620).

2. The statutory provisions on which the first count was based are as follows: "A person commits an offense if *he* has sexual intercourse with a female not his wife without the female's consent. * * * The intercourse is without the female's consent * * * [if] he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances." (Emphasis added). Tex. Pen. Code, sec. 21.02.

3. The provisions of the charge which submitted the first count to the jury were as follows: ". . . if you believe from the evidence beyond a reasonable doubt that the defendant, Charles G. Hanner, on or about the 20th day of May, 1975, in the County of Brazoria and State of Texas . . . did then and there intentionally or knowingly by force, that overcame such earnest resistance as might reasonably have been expected under the circumstances, compel Glenda R. Sanders, a female not his wife, to submit to sexual intercourse without her consent, you will find the defendant guilty of the offense of Rape by Force as charged in the first count of the indictment and so say by your verdict * * *." (R. 670). It will be observed that these provisions of the charge,—though showing the jury that to convict they had to find that petitioner did compel prosecutrix to submit to sexual intercourse,—did not require the jury, as a condition of convicting, to find either that petitioner compelled her to submit to sexual intercourse with *him* or that *he* had sexual intercourse with her.

REASONS FOR GRANTING THE WRIT

We submit that the omission of the general verdict to include by implication or otherwise a finding sufficient to establish the element that petitioner had sexual intercourse with the prosecutrix made his conviction repugnant to 14th Amendment due process and that therefore that omission, though not heretofore objected to, justifies a decision by this Court invalidating that conviction.

This position finds support in *Screws v. United States*, 325 U.S. 91, 107 (1945). That was a federal civil rights prosecution in which defendants contended he was denied a fair trial by reason of the unobjected to omission of the charge to submit one of the essential elements of the crime of which they were convicted. Sustaining that contention, this Court held as follows:

> To convict it was necessary for them [i.e. the jury] to find that petitioners had the purpose to deprive the prisoner of a constitutional right, e.g. the right to be tried by a court rather than by ordeal.
>
> * * *
>
> It is true that no exception was taken to the trial court's charge. Normally we would under those circumstances not take note of the error. * * * But there are exceptions to that rule. * * * And where the error is so fundamental as not to submit to the jury the essential ingredients of the only offense on which the conviction could rest, we think it is necessary to take note of it on our own motion. Even those guilty of the most heinous offenses are entitled to a fair trial. Whatever the degree of guilt, those charged with a federal crime are entitled to be tried by the standards of guilty which Congress has prescribed.

We invoke this reasoning in support of petitioner's claim that 14th Amendment due process is infringed where, as here, the State court judgment of conviction rests on a general verdict of guilty failing to find all essential elements constituting the offense charged. A judgment of conviction based on such a verdict necessarily produces the shocking consequence of causing the accused to be punished for conduct not denounced as criminal by the statutory provisions he is alleged to have violated. To punish accused for conduct the verdict does not find he committed violates due process just as much as punishing him for conduct the evidence fails to prove. *Cf. Thompson v. City of Louisville*, 362 U.S. 624 (1960).

We submit that the requirement that a general verdict of guilty in a State criminal action find all elements constituting the offense charged before it will constitutionally support a judgment of conviction is implicit in the concept of ordered liberty guaranteed by the due process clause of the 14th Amendment to the United States Constitution.

Since this requirement applies in every case where the general verdict is used to establish jury findings, and since this type of verdict is used universally in State courts, it is clear this requirement is an extremely important one of wide application in the administration of criminal jurisdiction in all State criminal actions. Beyond doubt the observance of this requirement is imperatively requisite to a fair system of justice in criminal prosecutions in State courts.

We submit that the granting by this Court of a writ of certiorari in this case offers an appropriate and

proper opportunity for this Court to establish and define this requirement as part of the basic freedoms guaranteed by the Due Process Clause of the 14th Amendment to the United States Constitution.

CONCLUSION

For the reasons given, a writ of certiorari should be granted.

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By: _____
GEORGE MICHAEL DEGEURIN
Attorneys for Petitioner

APPENDIX A

NO. 53786

CHARLES G. HANNER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

Appeal from Brazoria County

Court of Criminal Appeals of Texas,
En Banc.

November 1, 1978.

OPINION

Defendant was convicted in the 23rd Judicial District Court, Brazoria County, Paul Ferguson, J., of rape by force and defendant appealed. The Court of Criminal Appeals, Odom, J., held that: (1) trial court did not abuse its discretion in refusing to delete portion of defendant's written confession regarding his actions after alleged rape, which showed complete context in which criminal act allegedly occurred and which did not constitute evidence of a subsequent extraneous incident of defendant's immorality; (2) where defendant's notice of appeal from trial court's denial of his motion for new trial was not withdrawn, nor his sentence set aside before defendant's motion for new trial was filed, trial court lacked jurisdiction to entertain defendant's amended motion for new

trial, and (3) testimony of witness, who related statements made by rape victim and defendant as told to him by rape victim within very short period after offense occurred, we victim within very short period after offense occurred, were admissible on ground that statements were either "confined to the bare fact of complaint" or were res gestae of the offense, despite contention that such statements were hearsay.

Affirmed.

Roberts, J., filed opinion concurring in part and dissenting in part.

Luke W. Able, Jr., Houston, for appellant.

Ogden Bass, Dist. Atty. and Jerome L. Farrer, Asst. Crim. Dist. Atty., Angleton, for the State.

Before the Court en banc.

OPINION

ODOM, Judge.

This is an appeal from a conviction for rape by force.[1] The jury assessed the appellant's punishment at fifteen years' confinement in the Texas Department of Corrections.

The appellant contends that the trial judge erred by: (1) failing to delete portions from the appellant's written confession before it was admitted into evidence; (2) allowing the appellant's amended motion for new trial to be overruled by operation of law without holding a hearing

1. V.T.C.A., Penal Code Section 21.02(b)(1).

on it; (3) allowing in four instances, the introduction of hearsay evidence; (4) overruling the appellant's motion for mistrial; (5) failing to instruct the jury that they must find, beyond a reasonable doubt, that the appellant's penis penetrated the prosecutrix's vagina; (6) failing to instruct the jury on the lesser included offense of attempted rape; (7) failing to rule on the appellant's objection to the prosecutor's final argument; (8) failing to allow the appellant to develop and introduce evidence of jury misconduct and other errors during the appellant's hearing on his amended motion for new trial. We affirm.

The trial testimony reveals that in the early hours of May 20, 1975, the prosecutrix drove from Shreveport, Louisiana, to Surfside Beach in Freeport. The prosecutrix spent the day on the beach. At approximately 6:00 p.m., the appellant, the appellant's cousin, Charles Gilbreath, and another person identified only as James were driving along Surfside Beach when they saw the prosecutrix. At that time, the prosecutrix was putting together a charcoal grill. As Gilbreath drove the Plymouth by the prosecutrix, the appellant asked her if she needed any help. She responded that she did not need any assistance and Gilbreath continued to drive down the beach.

Gilbreath turned the car around and drove toward the prosecutrix. The appellant again asked the prosecutrix if she needed any help and she again responded in the negative. The next thing the prosecutrix realized, the appellant was standing beside her trying to make "small talk." She merely continued to put the grill together.

The prosecutrix finally asked the appellant to leave.[2]

2. By this time Gilbreath and the other occupant of the car had left the immediate vicinity.

The appellant asked why, and she told him that she had come to the beach to be alone. The appellant then started to walk down the beach.

Just as the appellant started to walk down the beach, the prosecutrix realized that a nearby Winnebago camper was in the process of leaving. The prosecutrix picked up her grill and put it into the hatchback of her car. She then got into her car to drive away, but the appellant came up to the driver's side of the prosecutrix's car, grabbed the door, opened it and forced himself inside, thereby forcing the prosecutrix over to the middle of the car. The prosecutrix asked him what he was doing and told him to leave her car.

When the appellant failed to respond to her demand to leave her car, she attempted to escape out the passenger side of the car. The appellant, however, put his arm around her neck and restrained her. Then the appellant told her "to shut up, to quit hollering," and that he "had a gun" and "he would use it" if necessary.

A physical struggle ensued during which the appellant punched the prosecutrix in her left eye. The force and threats employed by the appellant were sufficient to subdue the prosecutrix to the point where the appellant was able to start the car and drive it down the beach. As the appellant drove the prosecutrix's car down the beach, he had his arm around her neck and was feeling her breasts while telling her that he was going to "f__k" and "e__t" her.

The appellant stopped the car, but the appellant's companions drove up. The appellant promptly started the prosecutrix's car and drove further along the beach.

When the appellant subsequently stopped her car, the appellant told the prosecutrix to take off her clothes. The prosecutrix, who was crying, begged the appellant to let her alone. The appellant yelled at the prosecutrix and hit her again. He then ripped off the top button of the prosecutrix's blouse. The prosecutrix then removed her clothes and laid down on the front seat.

The appellant unzipped his pants and attempted to insert his penis into the prosecutrix's vagina. The prosecutrix testified that the appellant could not achieve an "erection" and that, despite his efforts, his penis only partially penetrated her vagina. The appellant subsequently forced the prosecutrix into the back portion or hatchback area of her car. He then continued to rape her for approximately ten to fifteen minutes.

Thereafter, the appellant got out of the prosecutrix's car and told her that he would kill her if she reported the occurrence. The prosecutrix got into the driver's seat and attempted to drive away, but the car got stuck in the sand. The appellant recruited Gilbreath and James to assist him in getting the prosecutrix's car out of the sand. The Plymouth was subsequently backed up to the prosecutrix's car so that chains could be attached to it.

Meanwhile, a car driven by Edward Springs, which had driven by the prosecutrix's car twice during the rape, passed by a third time. The prosecutrix waved at him and attracted his attention. Springs drove up and watched the appellant and his companions free the prosecutrix's car from the sand. At that time, the prosecutrix drove off and Springs followed her. When the prosecutrix stopped her car a short way down the beach, Springs got out of

his car and asked her if she had been attacked. The prosecutrix responded in the affirmative and Springs took the prosecutrix to a nearby convenience store to call the police.

The police were summoned, and the prosecutrix was examined by a physician. There was no evidence of sperm in her vagina and no evidence of any trauma in her pelvic area.

The defensive testimony focused on the appellant's alcoholic condition during the time of the rape. The testimony tends to show that it would have been impossible for the appellant to have been able to have sexual intercourse with the prosecutrix. The defense also presented evidence that any sexual contact between the appellant and the prosecutrix was consensual in nature.

[1] The appellant's first contention is that the trial judge erred by failing to delete a portion of the appellant's confession. The portion of which the appellant complains is the italicized portion of the following:

> *"I met some old woman on the street and took her to Rosie's.* We had a beer there then I was going to take the woman back to the Cozy Lounge. I told Ray to come back to the Cozy and pick me up.
>
> "Just as I got outside the Cozy, I was picked up by Freeport Police Department."

The events which the appellant wanted deleted occurred after the rape. The appellant contends that the events reveal an extraneous instance of immorality. The appellant relies upon *Chatterfield v. State,* 436 S.W.2d 146 (Tex. Cr. App. 1969).

In *Chatterfield,* the defendant was charged with assault to rob. Over the defendant's objection, the prosecutor elicited, in his case-in-chief, a telephone conversation the defendant had with a married woman within one hour of the commission of the offense. This Court there held that

> "[t]he testimony relating the telephone conversation was not pertinent to any issue raised on the trial, and shows appellant's conduct which was wholly disassociated with the offense for which he was on trial, and was of such a nature that it was reasonably calculated to prejudice his rights and deprive him of a fair and impartial trial on the issue of whether the jury would recommend that his sentence be probated."

However, we do not view the "objectable" portion of the appellant's confession as evidence of an extraneous offense unrelated to the offense on trial. Rather, the events demonstrate the appellant's actions following the rape. The appellant's actions immediately after the rape were admissible to show the complete context in which the criminal act occurred. *Albrecht v. State,* 486 S.W.2d 97 (Tex. Cr. App. 1972). Cf *Lewis v State,* 529 S.W.2d 533 (Tex. Cr. App. 1975).

Moreover, even if the objectionable portion of the confession should have been deleted to avoid any possibility of prejudice, we do not consider the objectionable portion of the appellant's confession to be so prejudicial as to conclude that the trial judge abused his discretion in refusing to delete it. Cf. *DeLeon v. State,* 500 S.W.2d 862 (Tex. Cr. App. 1973). Appellant's first contention is overruled.

[2] The appellant's second contention is that the trial judge erred by allowing the appelalnt's amended motion for new trial to be overruled by operation of law.[3]

On January 23, 1976, the jury returned a verdict finding the appellant guilty. The jury assessed the appellant's punishment at fifteen years. That same day, the trial judge entered the judgment and set the sentencing for February 5, 1976.

On February 4, 1976, the appellant filed his motion for new trial. The appellant's motion for new trial was overruled by the trial judge on February 5, 1976, sentence was pronounced, and appellant gave notice of appeal. On February 9, 1976, the appellant filed an amended motion for new trial and the trial judge set a hearing for February 19, 1976. However, a hearing on the amended motion for new trial was not held until March 18, 1976. Because notice of appeal was not withdrawn and the sentence was not set aside before the February 9 motion for new trial was filed, the trial court lacked jurisdiction to entertain it and it should not have been considered. *Locke v. State,* 502 S.W.2d 1 (Tex. Cr. App.), and authorities cited there. The ground of error is overruled.

[3] The appellant's third, fourth, fifth and sixth grounds of error contend that the trial judge impermissibly allowed the prosecutor to introduce hearsay evidence of the prosecutrix's statements to Edward Springs and that these statements bolstered the prosecutrix's unimpeached testimony.

3. The amended motion for new trial was filed on February 9, 1976. The hearing on the amended motion for new trial was not held until thirty-eight days later.

The statements made by the prosecutrix to Springs, by the prosecutrix, and introduced through Springs were that: (1) the prosecutrix did not know the men; (2) the prosecutrix was molested by the large man; (3) the prosecutrix told the appellant that she would not report him if he turned her loose; and that (4) the appellant told her that he would kill her if she reported the rape.

All of these statements were made by the prosecutrix or repeated to Springs within a very short period after the offense was committed. In *Knox v. State,* 487 S.W.2d 322, 327 (Tex. Cr. App. 1972), we quoted the following from 48 Tex.Jur.2d, Rape, Section 56, p. 691:

> " ' The fact that the prosecutrix cried out or complained of an outrage perpetuated on her, shortly after its occurrence, may be proved by the state. . . . Though the details of the cry or complaint must be part of the res gestae in order to be admissible as original evidence, the question whether the statements made were strictly res gestae is immaterial where the evidence is confined to the bare fact of complaint.' "

We hold that all the foregoing statements were either "confined to the bare fact of complaint" or were res gestae of the offense. *Albrecht v. State, supra; Price v. State,,* 496 S.W.2d 103 (Tex. Cr. App. 1973). Appellant's third, fourth, fifth and sixth contentions are overruled.

The appellant's seventh contention is that the trial judge abused his discretion by refusing to grant the appellant's motion for mistrial after the prosecutor elicited, on cross-examination, that the defensive witness was the appellant's brother-in-law.

The appellant called Fred Sheffield to testify to the appellant's reputation for beeing a peaceful and law-abiding citizen. On cross-examination, the prosecutor asked the witness if he was related to the appellant. When Sheffield responded that he was related to the appellant, the prosecutor asked in what manner. Sheffield responded: "Brother-in-law."

[4-6] It is well established that the State should not prove that a defendant in a rape case is married. *Lassere v. State,* 458 S.W.2d 81 (Tex. Cr. App. 1970). In the present case, Sheffield's testimony did not reveal that the *appellant* was married, only that the appellant had a brother-in-law. Moreover, during the guilt or innocence stage of the trial, the appellant called his wife to testify that the appellant was physically unable to engage in sexual intercourse when he consumed large quantities of alcoholic beverages. Any error was waived by the introduction of similar evidence by the appellant. Appellant's seventh contention is overruled.[4]

The appellant's eighth contention is that the trial judge erred by failing to charge the jury that they must find, beyond a reasonable doubt, that the appellant's penis penetrated the prosecutrix's vagina.

[7] The trial judge defined sexual intercourse to mean "any penetration of the female sex organ by the male sex organ." This language tracked the definition of sexual intercourse set forth in V.T.C.A., Penal Code Section 21.01(3). The trial judge thereafter instructed the jury that they must find beyond a reasonable doubt that sexual

4. We also note that the State could properly elicit the fact that the witness was related to the appellant so as to attempt to show the witness' bias. *Cf. Coleman v. State,* 545 S.W.2d 831 (Tex. Cr. App. 1977).

intercourse occurred. The charge was proper. No error is shown. Appellant's eighth contention is overruled.

[8] The appellant's ninth contention is that the trial judge committed fundamental error by failing to charge the jury on the lesser included offense of attempted rape. Basically, the appellant contends that the defensive evidence of his impotency is the converse of penetration.

The obvious flaw in the appellant's argument is that his request that the trial judge instruct the jury that they had to find, beyond a reasonable doubt, that the appellant's penis had penetrated the prosecutrix's sexual organ, even coupled with the defensive evidence of impotency, did not put the trial judge on notice that the appellant desired an instruction on attempted rape. Also, we are not aware of whether the appellant consciously chose not to submit a requested instruction on attempted rape in the hope that the jury would believe his impotency defense and acquit him. This is not one of those situations where the appellant's counsel's failure to act cannot be classified as trial strategy. Cf. *Ruth v. State,* 522 S.W.2d 517, 519 (Tex. Cr. App. 1975) (Morrison, J., concurring). Fundamental error is not shown. Cf. *Harris v. State,* 522 S.W.2d 199 (Tex. Cr. App. 1975). Appellant's ninth contention is overruled.

[9] The appellant's tenth contention is that the prosecutor went outside the record during his final argument at the guilt or innocence stage by stating:

> "You know things have changed in the last few years: Twenty years ago people didn't even have locks on their doors. People who grew up around here, you would go to people's houses, nobody locked their doors, and now what happens when

you go to somebody's house at night? Knock on the door. You are going to sit there and wait three or four minutes while they come and look through the peephole. Then unlock the chain, then undo the dead bolt."

The following then occurred:

"[Appellant's Counsel]: I object to this line of argument. It is completely outside the record and I would object to it. If we could confine ourselves to the record I think we could speed this up, and I object to his going outside.

[Prosecutor]: May I proceed?

"THE COURT: You may."

[10] It is plain that the appellant did not obtain an adverse conclusory ruling. *Bailey v. State,* 532 S.W.2d 316 (Tex. Cr. App. 1975); *Nichols v. State,* 504 S.W.2d 462 (Tex. Cr. App. 1974). Nothing is before us for review. Appellant's tenth contention is overruled.[5]

The appellant's eleventh through eighteenth grounds of error concern the hearing held on the appellant's amended motion for new trial. Since we have previously held that the trial court lacked jurisdiction to hear the motion, it is clear that the hearing on the amended motion for new trial was not authorized and any errors which occurred during it are not properly before us. Appellant's grounds of error eleven through eighteen are overruled.

The judgment is affirmed.

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5. The appellant has couched his ground of error in terms that the trial judge erred by failing to rule on the objection. A trial judge has an obligation to rule on objections, but defense counsel likewise have an obligation to press the trial judge to definite ruling on the objection.

ROBERTS, Judge, concurring in part and dissenting in part.

I agree with the results reached by the majority. However, I dissent to the method used to dispose of appellant's second ground of error.

At the outset, I note that the appellant was convicted on January 23, 1976. Thus, the appellant had ten days in which to file a motion for new trial and motion in arrest of judgment. Articles 40.05 and 41.02, Vernon's Ann. C. C. P. The appellant had until Monday February 2, 1976, to file these motions. However, the appellant did not file his motion for new trial until February 4, 1976. The untimely motion for new trial was expressly overruled on February 5, 1976.

On February 9, 1976, an amended motion for new trial was filed. A hearing was held on that untimely filed amended motion for new trial on March 18, 1976.

The essential question is whether the trial judge's action in *expressly* overruling the appellant's untimely filed motion for new trial deprived the trial judge of the power to grant the appellant leave to file an amended motion for new trial.

Article 40.05, Vernon's Ann. C. C. P., states:

"A motion for new trial shall be filed within ten days after conviction as evidenced by the verdict of the jury, *and may be amended by leave of the court at any time before it is acted on within twenty days after it is filed.* Such motion shall be presented to the court within ten days after the filing of the original or amended motion, and shall be determined by the court within twenty days after the filing of

> the original or amended motion, but for good cause shown the time for filing or amending may be extended by the court, but shall not delay the filing of the record on appeal. . . ." (Emphasis added.)

In *Clopton v. State,* 563 S.W.2d 930 (Tex. Cr. App. 1978), the defendant timely filed an original motion for new trial. Twenty days thereafter, the original motion for new trial was overruled *by operation of law.* Thereafter, a second motion for new trial was filed. This Court there held that despite the fact that the original motion for new trial had been overruled by operation of law the trial judge had the power to consider a second motion for new trial and that the record did not have to reflect that the trial judge found that good cause existed for the untimely filing of the second motion for new trial.

A different situation is presented in this appeal. Two factors significantly distinguish the present case from *Clopton*: (1) Unlike *Clopton,* the first motion for new trial was not timely filed; and (2) unlike *Clopton,* the trial judge *expressly* overruled the first motion for new trial.

It is clear that unlike *Clopton* the trial judge did affirmatively rule on the appellant's original motion for new trial within twenty days after it was untimely filed. In light of the language of Article 40.05, Vernon's Ann. C. C. P., and the distinctions between the present case and *Clopton,* I would hold that the trial judge's express ruling on the original untimely filed motion for new trial deprived him of the *power* to grant the appellant leave to file an untimely amended motion for new trial. For this reason I would overrule appellant's second ground of error.

APPENDIX B

IN THE
COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AUSTIN, TEXAS

Appeal No. 53,786

CHARLES G. HANNER

v.

THE STATE OF TEXAS

NOTICE OF ENTRY AS ATTORNEYS ON APPEAL

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW MIKE DeGEURIN, of the firm of Foreman & DeGuerin, and hereby gives notice of entry as attorneys for Charles G. Hanner on appeal in the above referenced cause.

Respectfully submitted,

FOREMAN & DeGUERIN

By: _____

Mike DeGeurin
Attorneys for Appellant
806 Main, Suite 512
Houston, Texas 77002
(713) 224-9321

CERTIFICATE OF SERVICE

I, Mike DeGeurin, hereby certify that a true copy of the foregoing "Notice of Entry as Attorneys on Appeal" has been mailed to Hon. Ogden Bass, District Attorney of Brazoria County, Brazoria County Courthouse, Angleton, Texas this 15th day of November, 1978.

_____

Mike DeGeurin

APPENDIX C

IN THE
COURT OF CRIMINAL APPEALS
FOR THE STATE OF TEXAS
AUSTIN, TEXAS

Appeal No. 53,786

CHARLES G. HANNER

v.

THE STATE OF TEXAS

MOTION FOR ENLARGEMENT OF TIME WITHIN WHICH TO FILE MOTION FOR REHEARING

TO THE HONORABLE JUDGES OF SAID COURT:

COMES NOW CHARLES G. HANNER, Appellant herein, by and through his attorneys, Percy Foreman and Mike DeGeurin, and moves the Court for an enlargement of time within which to file his motion for rehearing, and in support hereof would respectfully show this Honorable Court as follows:

I.

This Honorable Court rendered its opinion in this cause on November 1, 1978. News of the affirmance of the conviction came to Appellant herein on November 3, 1978. The time within which to file the motion for rehearing is presently November 16, 1978.

II.

Appellant is unable to file his motion for rehearing by November 16, 1978 for the reasons that follow:

Appellant's family retained the firm of Foreman & DeGuerin on Monday, November 6, 1978 to enter this cause and represent Appellant on appeal. On November 8, 1978 Appellant's file was obtained from Mr. Luke W. Able, Jr., who was the attorney representing Defendant/Appellant on appeal until November 6, 1978. On November 14, 1978 Mike DeGeurin, one of the now attorneys for Defendant on appeal, was able to obtain a copy of the Record on Appeal from the clerk's office of Brazoria County in Angleton, Texas.

The present attorneys for the Appellant were not the trial attorneys for the Appellant/Defendant. Appellant's new attorneys need additional time within which to read the Statement of Facts of the trial, the Record on Appeal, the briefs of counsel and the opinion of this Honorable Court in order to intelligently present to this Honorable Court a motion for rehearing.

III.

Appellant requests this Court to grant an additional fifteen days within which to file leave to file his motion for rehearing. This motion is not made for the purposes of delay but to insure the Appellant due process of law and effective assistance of counsel on appeal.

WHEREFORE, PREMISES CONSIDERED, Appellant prays the court will grant this motion and enlarge the

time within which to file the motion for rehearing fifteen days to and including December 1, 1978.

Respectfully submitted,

FOREMAN & DeGUERIN

By: _____
Mike DeGeurin

Attorneys for Appellant
806 Main, Suite 512
Houston, Texas 77002
(713) 224-9321

CERTIFICATE OF SERVICE

I, Mike DeGeurin, hereby certify that a true copy of the foregoing "Motion for enlargement of Time Within Which to File Motion for Rehearing" has been furnished to Mr. Ogden Bass, District Attorney of Brazoria County, Texas, by mailing same to him this 15th day of November, 1978.

_____
Mike DeGeurin

APPENDIX D

NO. 53,786

CHARLES G. HANNER
v.
THE STATE OF TEXAS

Appeal from Brazoria County

ORDER

On this day came on to be considered appellant's motion for extension of time within which to file a motion for rehearing, and the Court is of the opinion that said motion should be denied.

Therefore, it is ORDERED, ADJUDGED and DECREED by the Court of Criminal Appeals that said motion for extension of time to file a motion for rehearing be, and it is hereby, in all things denied.

It is so ordered on this 20th day of November, 1978.

PER CURIAM
(En Banc)

APPENDIX E

No. 9851

THE STATE OF TEXAS
v.
CHARLES G. HANNER

INDICTMENT

Offense
1st Ct.—RAPE BY FORCE
2nd Ct.—RAPE BY THREATS

Filed October 22, 1975

Frances Bennett, District Clerk

By Jackie Moff, Deputy

IN THE NAME AND BY AUTHORITY
OF THE STATE OF TEXAS:

The Grand Jurors for the County of Brazoria, State of Texas, duly selected, impaneled, sworn, charged and organized as such at the October-March Term, A.D. 1975, of the 23rd Judicial District Court of said County, upon their oaths present in and to said Court, that Charles G. Hanner, on or about the 20th day of May, A.D. 1975, and before the presentment of this indictment, in said County and State, did then and there intentionally and knowingly by force, that overcame such earnest resistance as might reasonably have been expected under the circumstances, compel Glenda R. Sanders, a female not his wife, to submit to sexual intercourse without her consent;

And the Grand Jurors aforesaid, upon their oaths aforesaid, in said County and State, at said term, do further present in and to said Court that before the presentment of this indictment, on or about the 20th day of May, A. D. 1975, in the County and State aforesaid, Charles G. Hanner, did then and there intentionally and knowingly by threats, that would prevent resistance by a woman of ordinary resolution, compel Glenda R. Sanders, a female not his wife, to submit to sexual intercourse without her consent;

AGAINST THE PEACE AND
DIGNITY OF THE STATE.

/s/ JOHN W. McNEIL
Foreman of the Grand Jury.

APPENDIX F

NO. 9851

IN THE DISTRICT COURT
OF BRAZORIA COUNTY, TEXAS

THE STATE OF TEXAS
v.
CHARLES G. HANNER

MEMBERS OF THE JURY:

The defendant, Charles G. Hanner, stands charged in the first count of the indictment with the offense of Rape by Force, alleged to have been committed in Brazoria County, Texas, on or about the 20th day of May, 1975. In the second count of the indictment, Charles G. Hanner stands charged with the offense of Rape by Threats, alleged to have been committed in Brazoria County, Texas, on or about the 20th day of May, 1975. To these charges, the defendant has pleaded not guilty.

I now give you the law that applies to this case.

A person commits the offense of rape if he intentionally or knowingly has sexual intercourse with a female not his wife without the female's consent. The intercourse is without the female's consent under the following circumstances:

(1) he compels her to submit or participate by force that overcomes such earnest resistance as might reasonably be expected under the circumstances;

(2) he compels her to submit or participate by any threat that would prevent resistance by a woman of ordinary resolution.

"Sexual intercourse" means any penetration of the female sex organ by the male sex organ.

"Consent" means assent in fact, whether express or apparent.

Now, bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the defendant, Charles G. Hanner, on or about the 20th day of May, 1975, in the County of Brazoria and State of Texas, as alleged in the indictment, did then and there intentionally or knowingly by force, that overcame such earnest resistance as might reasonably have been expected under the circumstances, compel Glenda R. Sanders, a female not his wife, to submit to sexual intercouse without her consent, you will find the defendant guilty of the offense of Rape by Force, as charged in the first count of the indictment, and so say by your verdict, but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant of the offense of Rape by Force, as charged in the first count of the indictment, and proceed to consider whether the defendant is guilty of the second count of the indictment.

Now, bearing in mind the foregoing instructions, if you believe from the evidence beyond a reasonable doubt, that the defendant, Charles G. Hanner, on or about the 20th day of May, 1975, in the County of Brazoria and State of Texas, as alleged in the indictment, did then and there intentionally or knowingly by threats, that overcame such earnest resistance as might reasonably have

been expected under the circumstances, compel Glenda R. Sanders, a female not his wife, to submit to sexual intercourse without her consent, you will find the defendant guilty of the offense of Rape by Threats, as charged in the second count of the indictment, and so say by your verdict, but if you do not so believe, or if you have a reasonable doubt thereof, you will acquit the defendant and say by your verdict, "Not Guilty".

Before the defendant could be found guilty of rape by force, you must find from the evidence beyond a reasonable doubt that not only did the prosecutrix not consent but that she put forth such earnest resistance as might reasonably be expected of her under the circumstances.

Now if you find from the evidence, or if you have a reasonable doubt thereof, that the said female, Glenda R. Sanders, on the occasion in question, failed to exert such earnest resistance to the defendant as might reasonably be expected of her under the circumstances then existing, and that she was not caused to permit defendant to have sexual intercourse with her by the use by the defendant of threats that would prevent resistance by a woman of ordinary resolution, then you will acquit the defendant.

If you find from the evidence that defendant had sexual intercourse with Glenda R. Sanders but you further find that such intercourse was with the consent of Glenda R. Sanders, or if you have a reasonable doubt thereof, you will acquit the defendant. You are instructed that such consent need not be in words, necessarily; it may be evidenced by conduct and acts of the female in question, and if she willingly yielded her person to the defendant

for sexual intercourse, that would, in law, be consent; and in such event, the defendant would be entitled to an acquittal.

You are further instructed that you may not find the defendant guilty of more than one of the counts charged in the indictment in this case. Under the instructions contained in this charge, if you should find the defendant to be not guilty of all counts charged by the indictment in this case, you shall say by your verdict, "Not Guilty."

The Court has admitted into evidence before you a written statement of the defendant, and you are instructed that before you may consider the same for any purpose you must first believe from the evidence beyond a reasonable doubt that the same was freely and voluntarily made without compulsion or persuasion by the defendant and signed by him and that prior thereto the person to whom the statement was made warned the defendant, first; that you have the right to have a lawyer present to advise you either prior to any questioning or during any questioning, second; that if you are unable to employ a lawyer, you have the right to have a lawyer appointed to counsel with you prior to or during any questioning, and third; that you have the right to remain silent and not make any statement at all and any statement made by you may be used against you at your trial, but if you do not so believe, or if you have a reasonable doubt thereof, then the said alleged statement is entirely withdrawn from your consideration and you shall not give the same any force or effect whatever or consider it as any evidence of the defendant's guilt in this case.

You are instructed that the law provides that the failure of a defendant to testify shall not be taken as a circum-

stance against him, and you must not allude to, comment on, or discuss in your retirement the failure of a defendant to testify in this cause, nor will you refer to or discuss any matter not before you in evidence.

You are instructed that a Grand Jury indictment is not evidence of guilt. It is a means whereby a defendant is brought to trial in a felony prosecution. It is not evidence, nor can it be considered by you in passing upon the innocence or guilt of this defendant.

The burden of proof in all criminal cases rests upon the State throughout the trial, and never shifts to the defendant.

The defendant is presumed to be innocent until his guilt is established by legal evidence beyond a reasonable doubt, and in case you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, then you will acquit him and say by your verdict, "Not Guilty."

You are further instructed that in deliberating upon your verdict in this case you must not consider or discuss any matter, fact or circumstance which has not been introduced in evidence before you upon the trial of this case; and in reaching your verdict you are instructed that the same cannot be arrived at by lot or chance.

After you retire to your jury room, you should select one of your members as your foreman. It is his duty to preside at your deliberations, vote with you, and when you have unanimously agreed upon a verdict to certify to your verdict by using the appropriate form attached hereto and signing the same as the foreman.

You are instructed that your verdict must be unanimous.

After you have retired to consider your verdict, no one has the authority to communicate with you except the officer who has you in charge.

Should any juror have any knowledge of any fact in reference to this case, either from hearsay or otherwise, or should any juror have any knowledge as to the character of any witness who has testified at this trial, either in favor of or against such witness, such juror is prohibited from stating such knowledge to his fellow jurors; but, in deliberating upon this case you will, in accordance with your oaths, confine yourselves to the evidence adduced upon the trial before you alone.

You are the exclusive judges of the facts proved, the credibility of the witnesses, and the weight to be given to their testimony, but by law you are bound under your oaths to take from the charge of the Court, as herein given you, and be guided thereby.

In the event you desire to communicate with the Court on any matter in connection with your deliberations, your foreman shall notify the bailiff, who will inform the Court thereof. Any communication relative to the cause must be written, prepared by the foreman and be submitted to the Court through the Court baliff.

/s/ PAUL FERGUSON
Judge Presiding

NO. 9851

The State of Texas	§	In The District Court
Vs.	§	Of
Charles G. Hanner	§	Brazoria County, Texas

VERDICT

We, the jury, find the defendant, Charles G. Hanner, not guilty.

_____
Foreman

Supreme Court, U. S.
FILED
FEB 24 1979
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

78-1159

CHARLES G. HANNER,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

STATE'S REPLY TO PETITION FOR WRIT OF CERTIORARI

By and Through: THE STATE OF TEXAS
THE CRIMINAL DISTRICT ATTORNEY
OF BRAZORIA COUNTY, TEXAS
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

CHARLES G. HANNER,
Petitioner

v.

THE STATE OF TEXAS,
Respondent

STATE'S REPLY TO PETITIONER'S WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

Respondent prays that a writ of certiorari be denied, to review the judgment of the Texas Court of Criminal Appeals entered in the above entitled case on November 1, 1978.

OPINIONS BELOW

Are as stated in Petitioner's brief.

JURISDICTION

Is as stated in Petitioner's brief.

QUESTION PRESENTED

Did the jury's general verdict include by implication or otherwise a finding that the Petitioner personally en-

gaged in sexual intercourse with the Prosecutrix. The federal question presented is whether or not the absence of a specific finding thereon is a violation of the Fourteenth Amendment due process rights.

CONSTITUTIONAL PROVISIONS INVOLVED

Fourteenth Amendment rights of "due process".

STATEMENT

The Petitioner has correctly stated the facts and results of the case.

The trial judge defined "sexual intercourse" to mean "any penetration of the female sex organ by the male sex organ". The trial judge thereafter instructed the jury that they must find beyond a reasonable doubt that sexual intercourse occurred. The trial court further charged the jury,

> "if you believe from the evidence beyond a reasonable doubt that the Defendant, Charles G. Hanner, on or about the 20th day of May, 1975, in the County of Brazoria and State of Texas . . . did then and there intentionally or knowingly by force, that overcame such earnest resistance as might reasonably have been expected under the circumstances, compel Glenda R. Sanders, a female not his wife, to submit to sexual intercourse without her consent, you will find the Defendant guilty of the offense of Rape by Force as charged in the first count of the indictment and so say by your verdict . . . (R. 670).

The prosecutrix testified that Petitioner could not achieve an "erection" and that despite his efforts his penis only partially penetrated her vagina. Petitioner first

raped prosecutrix on the front seat of the car, and subsequently forced prosecutrix into the back portion or hatchback area of the car, where he then continued to rape her for approximately ten to fifteen minutes.

ARGUMENT AND AUTHORITIES FOR NOT GRANTING THE WRIT

The State submits that the above summary of the trial court's charge and of the evidence clearly includes a finding (by implication, if necessary) that the Petitioner *did in fact* have sexual intercourse with the Prosecutrix, and under the law and facts of this case, there can be no finding by the Supreme Court of the United States that Petitioner was denied his Fourteenth Amendment "due process" rights. *Hanner v. State,* 572 S.W.2d 702 (Tex. Crim. App. 1978); Sec. 21.01(3), Texas Penal Code; Sec. 21.02, Texas Penal Code. The case of *Posey v. State,* 38 So. 1019, 143 Ala. 54, held that where the court charges that actual penetration is sufficient, it is proper to refuse to charge that the accused must have had sexual intercourse.

Other Texas Court of Criminal Appeals cases upholding this type of action by a trial court are: *Jones v. State,* 119 Cr. R. 525, 46 S.W.2d 308 (1932), holding that in a prosecution for rape by force, the trial court's definition of "force" was sufficiently explicit where the only issue was as to whether there was sexual intercourse; *Hall v. State,* 141 Cr. R. 607, 150 S.W.2d 404 (1941), holding that in a trial for rape, the court's charge, sufficiently defining rape, force and threats, was not erroneous because of failure to define carnal knowledge, ravished, consent, resistance and penetration.

Some pertinent Federal cases concerned with the sufficiency of the trial court's instructions are as follows: *U. S. v. Marshall,* 266 F.2d 92 (7th Cir. 1959), holding that in a rape prosecution, the instructions as a whole, which clearly defined the elements of the offenses involved, fairly charged the jury as to the applicable law; and other cases under Section 822(6), "Criminal Law", West's Modern Federal Practice Digest, upholding the principle of law that a court's charge which clearly defines the elements of the offense, when considered as a whole and viewed in its entirety, and in the light of the evidence in the case, is sufficient to comply with the requirements of the law.

Further, the Petitioner failed to request an instruction requiring a finding that the Defendant personally had sexual intercourse with the prosecutrix, and his failure to do so, under Texas law, constitutes a waiver of the right to complain thereof (unless such a failure is fundamental error). See Texas Code of Criminal Procedure Articles 36.14, 36.15, 36.16, 36.17, 36.18 and 36.19. In accord, *Johnson v. State,* 449 S.W.2d 65 (Tex. Crim. App. 1969), holding that Defendant's contention that impotency rendered the accused incapable of committing the act of rape would not be determined where he did not present a requested charge on impotency nor object to the court's failure to charge thereon. In accord, *Grandham v. State,* 528 S.W.2d 220 (Tex. Crim. App. 1975), cert. den. 96 S.Ct. 1434, 424 U.S. 957, 47 L.Ed.2d 363, holding that the Defendant failed to preserve for review issue of alleged insufficiency of trial court's definition of aggravated rape, where this objection was not included in Defendant's objections to the court's charge on punishment.

The United States Supreme Court case of *Screws v. U. S.,* 325 U.S. 91, 65 S.Ct. 1031 (1945), cited by the Petitioner herein, (at page 107) held that in the case where no exception was taken to the trial court's charge, the Supreme Court would not normally take note of the error, citing *Johnson v. U. S.,* 318 U.S. 189, 200, 63 S.Ct. 549, 555, 87 L.Ed. 704.

In accord, see cases on "Effect of Failure To Object or Except", Section 847, "Criminal Law", West's Modern Federal Practice Digest.

CONCLUSION

For the above reasons of fact and law, the State respectfully submits the Writ of Certiorari should be denied.

THE STATE OF TEXAS
By and Through: THE CRIMINAL DISTRICT ATTORNEY
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Brazoria County Courthouse
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By: _____
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